APPENDIX

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1975

No. 75-569

ALLIED CONTRACTORS, INC.

v.

TOWN OF FEDERALSBURG, MARYLAND

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF MARYLAND

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PETITION FOR A WRIT OF CERTIORARI
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OF MARYLAND

Letter Dated October 27, 1975
from Judge Marvin H. Smith to David Aaronson, Esq.

October 27, 1975

David Aaronson, Esq.
Room 201-A, Myers Building
American University Law School
Washington, D.C.

Re: Allied Contractors, Inc. v. Mayor and Council
of Federalsburg, Maryland

Dear Mr. Aaronson:

The petition for certiorari in the Supreme Court of the United States in the above matter, signed by you as attorney for Allied, has been brought to my attention. One never knows when comments are made which reflect adversely upon one's integrity whether one should ignore them or reply. Since I have always attempted to adhere to high standards of integrity and value my reputation accordingly, I feel I should reply.

There are certain passages in the petition which are subject to the inference that I in some manner influenced the Court of Appeals in its decision, notwithstanding the fact that I disqualified myself. For the record, *at no time did I ever directly or indirectly discuss with my brethren what their decision should be or attempted in any way to influence their decision.* Moreover, the standard operating procedure in the Court of Appeals of Maryland is for a judge who has disqualified himself for any reason in a case to take no part directly or indirectly in its decision.

I realize that comment has been made about the fact that copies of certain correspondence were directed to me. I assure you that from May 20, 1968, the day on which I took my oath as a Judge of the Court of Appeals, I was in no manner involved in the controversy between the Mayor and Council of Federalsburg and Allied Contractors. I was surprised when I received copies of one or more letters. (The only letter I honestly remember receiving was the one in which Allied's claim was rejected.) However, the sending of copies of correspondence to me must be placed in the context that Federalsburg (a town of about 2000 population) has been my home for 59 years; that I was attorney to the town of Federalsburg for 21 years; that the seeds of what came to be called the Marshyhope Project were planted back about 1948 when I was present of the Federalsburg Chamber of Commerce and Delaware farmers

began calling for additional drainage for their farmland, which drainage citizens of Federalsburg feared would have the effect of raising flood levels in Federalsburg; that I had been intimately connected with all phases of the project from its inception; and that the contracting officer and his wife are among the very close personal friends of my wife and me.

The first knowledge I have had of the fact that my name appeared on the letterhead of the Mayor and Council of Federalsburg in any correspondence from the town as late as September 16, 1969, was when I saw copy of letter of that date in your petition for cert. That is an obviously outdated letterhead. John Hargreaves ceased to be a councilman in December of 1966, resigning immediately prior to his being sworn in as a member of the House of Delegates. Leroy J. Nichols was designated to serve in his stead. My best recollection is that Mr. Nichols was supplanted at the election in April of 1967. Moreover, my best recollection is that Al Penrod did not run for re-election in 1967.

I shall appreciate your advice that you have brought this letter to the attention of Allied.

Very truly yours,

Marvin H. Smith

MHS:ee

cc: J. Owen Wise, Esq.
Denton, Maryland 21629
Starke M. Evans, Esq.
Honorable Wilson K. Barnes.

MOTION FOR A REARGUMENT, OR IN THE ALTERNATIVE EITHER FOR A MODIFICATION OF THE OPINION OF JUNE 3, 1975, OR FOR A STAY OF THE MANDATE AND A REMAND TO THE TRIAL COURT FOR THE TAKING OF ADDITIONAL TESTIMONY

Allied Contractors, Inc., Appellee, by Owen Wise, its Attorney, moves pursuant to Maryland Rule 850, for a

modification of the opinion filed by this Honorable Court and in support thereof respectfully shows:

Introduction

(1) The appeal in this case was argued before this Court on March 4, 1975.

(2) On June 3, 1975 this Court rendered its decision in favor of the Appellant in part and against Appellee in part from a judgment on the jury verdict for the Appellee, reducing the judgment of the Circuit Court for Queen Anne's County in the amount of $74,022.66 by $57,516.46 (amount allowed for the 1968 delay) to $16,506.24, and as so reduced, it was affirmed.

(3) Appellee seeks a modification of the opinion of June 3, 1975, such that the Claim for $57,516.46 was not barred by limitations upon the following grounds:

(A) The Court erred in that the Trial Court was not clearly in error when it ruled that there was legally sufficient extrinsic evidence that this contract was under seal.

(B) The Court erred in that the Trial Court was not clearly in error when it ruled that there was legally sufficient evidence of conduct by the parties which tolled the statute of limitations.

(C) The Court erred in that as a matter of recent Maryland case law, the 1968 delay claim was within the jurisdiction of the Contracting Officer for his equitable adjustment and that therefore his refusal to consider this claim as stated in his letter of October 21, 1968 was arbitrary, capricious, illegal, and improper, and as such could hardly have been and should not be assumed to have constituted his final decision in view of the requirement of Clauses 3 and 6 of the contract that a hearing be afforded prior to his final decision.

(D) In light of the foregoing, and new evidence which has been recently discovered, the Court should, in the alternative, remand this case for the taking of additional testimony of the witnesses on these points all as hereinafter set forth.

ARGUMENT

(A) THE COURT ERRED IN THAT THE TRIAL COURT WAS NOT CLEARLY IN ERROR WHEN IT RULED THAT THERE WAS LEGALLY SUFFICIENT EXTRINSIC EVIDENCE THAT THIS CONTRACT WAS UNDER SEAL.

Considering the previous finding by Judge Turner that this contract was under seal within the ambit of Section 5-102(a)(5) of the Courts and Judicial Proceedings Article, it would be an error on appeal to decline to follow and affirm his opinion dated July 12, 1973, unless the Trial Judge was clearly in error when he determined by a preponderance of the evidence that this contract was under seal. Maryland Rule 886. If there is substantial evidence to support the Trial Court's factual conclusion, that finding must be reviewed in the light most favorable to the prevailing party below and the Appellate Court should accept that conclusion. *Frisoen v. Tropp*, 258 Md. 629, 267 A.2d 143 (1970); *Liller v. Logsdon*, 261 Md. 367, 275 A.2d 469 (1971). To reiterate, the Trial Court, who saw and heard the witnesses and who had an opportunity to weigh and evaluate their testimony, found this contract to be a specialty. While the Appellee does not contest the jurisdiction of this Court under Rule 887 to review this interlocutory order, we believe that the Trial Judge's ruling that legally sufficient evidence exists must not be lightly set aside unless it was a palpable abuse of his discretion and patently mistaken. It is uncontroverted that the signature page of the contract document bears Allied Contractors, Inc. corporate seal. Appellee's apx. page 8). The Appellee subscribes to and adopts Judge Digges' learned exegesis of the law with respect to specialties in Maryland, particularly his ellucidation of the *dicta*

in General Petroleum Corp. v. Seaboard Terminals Corp., 23 F. Supp. 137 (1938), that a modicum of sufficient extrinsic evidence in the nature of "how and when and under what circumstances the corporate seal was affixed", will transform a corporate seal into a legal specialty. *Levin v. Friedman*, 271 Md. 438, 317 A.2d (1974); *Gildenhorn v. Columbia R.E. Title*, 271 Md. 387, 317 A.2d 836 (1974). In this case the record plainly reflects at page 9 of the Appellee's appendix that the Court was able to consider all these papers as part of the same unitary, continuous, and integrated contract document. In order to interpret this multi-faceted instrument, each portion of it must be considered together with all other portions to obtain one coherent and internally consistent whole. Therefore, this Court erred on page 6 of the opinion of June 3, 1975, where it is stated that "no reference to a seal is made in the body of the instrument." Quite to the contrary, page 9 of Appellee's appendix reveals that the testimony was that: "Q. Is this the contract that was submitted by the Mayor and Council of Federalsburg for the work you just described? A. Yes, with this comes the payment and performance bonds and the specifications, and *they're all part of the contractual document.*" It should be noted that the aforesaid payment and performance bonds and the power of attorney attached thereto are all under seal, the parties "having affixed their seals on the date set forth above." Although these particular parts of the contract were not introduced into evidence, reference was made to them before the Court. A specimen copy of the Bid Bond Form, which is also under seal is in evidence, however, inasmuch as this document also forms a part of the ultimate understanding of the parties and reflects their mutual intentions that this contract be sealed. The Court further could have taken judicial notice of the fact that this type of public works construction contract is most often under seal according to the customs, usage, and course of performance in that industry, due to the long duration of such work and the protracted processing of final payment for all claimes items. Although Allied did concede as indicated at page 4 of the Court's opinion dated

June 3, 1975 that the only evidence, "to support its assertion that the contract in this case is a specialty is that when the document was signed on behalf of Allied by the Vice President, he also impressed the corporate seal on the instrument," Allied has never conceded that the two pages of the signature sheet formed the entire contract and at Appellee's appendix, page 9, Mr. Pecora clearly stated otherwise. Thus, a logical construction and internal reconciliation of all parts of this instrument reveals that all but one signature is sealed, and of all the sealed signatures, only one is not clearly designated by language in the instrument as operating to transform this instrument into a speciality. As stated above, at this point in these proceedings, all findings below must be reviewed in the light most favorable to the Appellee, e.g., in that the entire contract document was intended to be under seal.

With respect to the Appellant's signatory, it is stated at the top of page 6 of the opinion of June 3, 1975 that, "no extensive evidence was presented to prove that the town, through adoption of the other party's seal or otherwise, intended the contract, at least as to itself, to operate as a specialty." Unfortunately, the Court does not afford the Appelle the benefit of the Maryland and majority rule so ably researched by the Court, which states that a rebuttable presumption of a party's adoption as his own of another party's seal can be established (e.g., such as when the instrument purports on its face to be sealed by all the parties signing it). (Stroller v. Cowan, 7G. & J. 284 (1835); *Rockwell v. Capital Traction Co.*, 25 U.S. App. 98 (D.C. Cir. 1905); *McNulty v. Medical Service of D.C., Inc.*, 176 A. 2(d) 783 (Mun. Ct. D.C., 1962). Applying this presumption in favor of Allied, along with the cardinal rule of public contract law that a unilaterally prepared contract of adhesion should be construed strictly against the party who wrote it, it would appear to follow that what the Court should have stressed is that the Appellant failed to put on any evidence at all to rebut this presumption of their adoption of the specialty. Although on the one hand, the doctrine of *Pearl Homing Company v. Linthicum*, 112 Md. 27, 75

A. 737 (1910), and State Use of *Gilkeson v. Humbird*, 54 Md. 327 (1880), is no doubt on point, nonetheless on the other hand, inasmuch as the Appellant has accepted the benefit of Allied's seal, it should also accept the burden of the snare it has created for its own convenience and protection. Otherwise, a grave injustice would inadvertently result, which, were the shoe on the other foot, the Appellant Town would no doubt itself object, *vis a vis*, a hypothetical suit by Federalsburg against Allied next year grounded upon the theory that this contract is really under seal.

Appellee would hope that the Court should not fail to formulate a rational answer that the question, "why would the parties insist that the Performance and Payment Bondas as sureties be under seal when the contract for which these Performance and Payment Bonds were the surety, was alleged not to be under seal.

(B) THE COURT ERRED IN THAT THE TRIAL COURT WAS NOT CLEARLY IN ERROR WHEN IT RULED THAT THERE WAS LEGALLY SUFFICIENT EVIDENCE OF CONDUCT BY THE PARTIES WHICH TOLLED THE STATUTE OF LIMITATIONS.

While the Appellee approves and accepts the Court's reasoning with respect to the tolling of limitations, both on the claim for extras and the 1967 delay claim, the Appellee respectfully represents that Judge Turner's ruling in his opinion of July 12, 1973 was not clearly in error because a preponderance of the evidence revealed a continued pattern of negotiation between the plaintiff and the defendant, particularly if the record is interpreted in the manner most favorable to the Appellee. Since there is substantial evidence to support the Trial Judge's factual conclusion below, then this Court should accept that conclusion and not disregard it as arbitrary or unreasonable. *Burroughs Int'l. Co. v. Datronics Eng's., Inc.*, 254 Md. 327, 255 A.2d 341 (1969). Judge Turner,

the Trial Judge, believed the Appellee's only witness, Mr. Pecora, who testified at the pre-trial hearing on the issue of limitations to the effect that on-going bilateral negotiation on the 1968 delay claim continued up until the time of the filing of this lawsuit. The question of credibility of witnesses is primarily for the trier of facts, and the Court of Appeals only changes the findings of fact of a trial judge when they are clearly erroneous. *Weaver v. State*, 226 Md. 431, 174 A.2d 76 (1961); *Johnson v. State*, 238 Md. 643, 210 A.2d 399 (1965). The transcript reflects at page 17 of the Appellee's appendix that the trial judge considered Mr. Pecora's testimony to the effect that there was a meeting with the Contracting Officer, Mr. John Hargreaves on February 19, 1969, which continued negotiations on the 1968 delay claim, as follows:

> "Thirdly, on our other large claim of the delay in the redesign of pier two and three, we had talked to him and explained that we had never really had a full meeting on that, that we did have one meeting one time in which the Soil Conservation people said that we (were) outside their scope."

The trial judge also had before him Allied's reply to the Appellant's February 25, 1969 letter, plaintiff's Exhibit No. 15, which Allied dated April 10, 1969, in which the vitality of the discussion of February 19, 1969 on the 1968 delay claim are demonstrated amply. The Appellee contends, however, that the Court misunderstood the tenor of the Appellant's letter, dated October 21, 1968, when at page 10 of the opinion it is stated that "there is no dispute that the rejection Communique was sent on 21 October, 1968, following the required grace period; and was received in due course shortly thereafter." Rather, the Appellee subscribes to Judge Turner's opinion at page 5 where he states' "Even defendant's own witness, Mr. Ifft, testified that negotiations were conducted after this date on bills and claims pertaining to the contract, which contract defendant now contends had then been completed. It is to be noted that on October 27, 1969, the Contracting Officer, Mr. Hargreaves,

wrote the plaintiff and agreed to further discussion of the claim. The Court agrees that it is doubtful, in this case, from the evidence before it, if limitations has yet begun to run, since there has yet to be a refusal by the Appellant to pay all the claims of the Appellee. It thus appears from the evidence that the Appellee was continuing to communicate with Appellant in such a way as to indicate an intention to pay the claim, the big question being when and which agency would ultimately be responsible for the cost of the work done."

A scrutiny of the Exhibits reveals legally substantial evidence to support this conclusion. Why would the Appellant have participated in the continuous meetings, correspondence, and discussions, which is uncontradicted by all the testimony, as late as 1971 if the 1968 claim had been finally rejected? The evidence of Appellant's mere failure to pay was not evidence that payment would not be forthcoming later. Consequently, the Appellee now finds itself in the posture of being penalized for relying on the representations and assumed good faith of the Appellant's agents, in an effort to settle these disputes short of litigation.

Several points remain to be reconsidered. As mentioned in the foregoing, the Appellant's letter dated October 21, 1968 was not a final rejection of the 1968 delay claim as interpreted by the Court. All that letter, at page 4, said in this regard is:

> "Also take notice that your reference to added cost of $57,516.42 reflecting a claim for delay was thoroughly discussed in light of the General Provisions of the contract at our October 7, 1968 meeting; and it was agreed that, under the terms of this contract, the contracting officer could not consider such a claim."

Thus, the merits of this claim were never considered as required by Clause 6 with reference to its two prerequisites:

(1) The Appellant never granted the Appellee at least thirty days in order to further support its claim, inasmuch as the Appellant's agents declined to assume jurisdiction over the subject matter for reasons to be more fully developed in Section C hereinbelow, primarily relating to recent changes in Maryland case law.

(2) The Appellant never furnished the Appellee a signed copy of the Contracting Officer's decision simply because no decision on the merits of this claim was ever reached. Inasmuch as it is conceded in the opinion that the performance by the Appellant town of these two prerequisites was a condition precedent to the running of limitations, at page 8 where it is stated:

> "it is upon actual compliance with the Appellant's contractual right of review that Allied's cause of action for these claims becomes both vested and enforceable,"

therefore, Appellee would submit that the noncompliance with the procedure in Clause 6 has arrested and suspended the statute of limitations. Thus, just as the Court has ruled with respect to the 1967 delay claim, so also with the 1968 delay claim Appellant failed to comply with the condition precedent provisions contained in Clause 6 requiring the thirty day grace period to be given Appellee to further substantiate its pending claim before the Appellant makes a final acceptance or rejection decision as aforesaid. There is no evidence of the consideration of the merits of this claim at any place in the entire record, and Appellant led Appellee to believe that the 1968 delay claim was also in the hopper, in that the Contractor Officer was palpably definite when he wanted to reject other charges, yet he never could respond with that same level of definiteness and clarity with respect to the 1968 delay claim, because he had never even heard the matter upon the evidence in the first instance.

It is rather conclusively established by at least two later letters in the Record that the letter of October 21, 1968 was not intended to be a final determination in regard to the 1968 delay claim for $57,516.42, item X-6. Plaintiff's Exhibit No. 3, which is in the Record, is a letter dated September 19, 1969 from John R. Hargreaves, Contracting Officer of the Appellant Town (and note, also wrote the letter of October 21, 1968) to Allied indicating that Mr. Hargreaves considered this claim still open and Plaintiff's Exhibit No. 37, also in the record, a letter dated September 26, 1969 from Allied to Mr. Hargraves shows that the 1968 delay claim, X-6, was still open. See particularly item 3 in the letter of September 26, 1969 and the second paragraph of the "Hargreaves" letter of September 19, 1969. For the convenience of the Court, the letter of September 19, 1969 is attached as "Movant's Exhibit 1" and the letter of September 26, 1969 as "Movant's Exhibit 2."

The second point referred to at the beginning of the preceeding paragraph, which must be considered in light of the applicable Maryland law espoused so ably by the Court concerns the letter from the Contracting Officer, dated February 25, 1969. Judge Turner was not clearly in error when, with this letter before him, he found that "clear, distinct, and unqualified admission" which constitutes the requisite acknowledgment of a claim required under Maryland law. *Doughty v. Bayne, 222 Md. 361, 160 A.2d* 604 (1960); *Hall v. Barlow,* 260 Md. 327, 272 A.2d 386 (1971); *Mettee v. Boone,* 251 Md. 332, 247 A.2d 390 (1968); *Brosius v. City of Hagerstown,* 237 Md. 374, 206 A.2d 571 (1965). Specifically, that letter reveals on page 2 that not only was an additional twenty-one days time extension granted, in part due to the 1968 delay claim, but in addition the closing paragraph requests "complet(ion) (of) the *release of claims* statement in the lower right-hand corner of this (final payment) estimate and return (of) the completed copy to me so that this estimate can be processed for payment." Thus, not only has the Appellant acknowledged the existence of unresolved and unconcluded claims, but the Appellant has even gone so far as to indirectly attempt to use the

threat of withholding final payment as a Sword of Damacles to coerce Allied into waiving these claims. (See Appellant's letters of September 19, 1969 and February 25, 1969).

Finally, in the foregoing vein, an examination of Appellant's letter dated Feburary 6, 1969 which was introduced into evidence, supports Allied's contention that the outstanding claim of $57,516.42 had not been fully resolved and that any pending matters were to be discussed at the meeting set up for February 19, 1969, particularly in the first sentence. "Arrangements have been made with all concerned parties to meet at John Hargreaves' office in Annapolis, Maryland, to discuss the remaining outstanding claims on our above mentioned contract." At a minimum, the words, "outstanding claims," are ambiguous and confusing with respect to the inclusion therein of any and all claims including the 1968 delay claim. Therefore, the finding of the trial judge, in favor of the Appellee, cannot and must not now be set aside; but, instead must be resolved in favor of the Appellee in accordance with the clear mandate of the authorities and the reasoning above set forth.

(C) THE COURT ERRED IN THAT AS A MATTER OF RECENT MARYLAND CASE LAW, THE 1968 DELAY CLAIM WAS WITHIN THE JURISDICTION OF THE CONTRACTING OFFICER FOR HIS EQUITABLE ADJUSTMENT AND THAT THEREFORE HIS REFUSAL TO CONSIDER THIS CLAIM AS STATED IN HIS LETTER OF OCTOBER 21, 1968 WAS ARBITRARY, CAPRICIOUS, ILLEGAL, AND IMPROPER, AND AS SUCH COULD HARDLY HAVE BEEN AND SHOULD NOT BE ASSUMED TO HAVE CONSTITUTED HIS FINAL DECISION IN VIEW OF THE REQUIREMENT OF CLAUSES 3 AND 6 OF THE CONTRACT THAT A HEARING BE AFFORDED PRIOR TO HIS FINAL DECISION.

It is most important to consider the position of the Appellee that the Contracting Officer acted arbitrarily, capriciously, and unreasonably when he declined to exercise subject matter jurisdiction over the 1968 delay claim in the amount of $57,516.42. Accordingly, his refusal to even consider the merits of this claim was arbitrary, unreasonable, capricious, and therefore improper and illegal. It would then appear to follow that the Contracting Officer could not in any way prejudice or annul, cancel, or terminate the contractually created right of a full and impartial review upon the merits of this 1968 claim by his illegal and improper foreclosure of any right to his review under Clauses 3 and 6.

The prior law in force at the time of the Contracting Officer's letter of October 21, 1968, in which he refused to decide the 1968 delay claim, was encapsulated in the landmark case relating to construction contracts known as *United States v. Rice*, 317 U.S. 61 (1942). *Rice* held that delay claims incident to changes in plans and specifications were never contemplated beyond the damage involved in the changes themselves, citing *Moran Bros. Co. v. U.S.*, 61 Ct. Cls. 73; *McCord v. U.S.*, 9 Ct. Cls. 155; *Swift v. U.S.*, 14 Ct. Cls. 208; *Griffiths v. U.S.*, 74 Ct. Cls. 245; 35 *Geo. Wash. L. Rev.* 908 (1967). The thrust of all these prior cases is this: When the Contracting Officer refused to consider Appellee's 1968 delay claim, he did so against the background of doctrine which held that it was not a breach of contract for the government to delay the contractor's performance for a reasonable time while ordering changes in the plans, drawings, and specifications.

According to Shedd's restatement of this prior doctrine at 32 *Geo. Wash, L. Rev.* 65 (1963), "The contractor cannot recover damages for breach of contract for the delay expense resulting from the reasonable time taken by the government to make the change, and the expense of such reasonable delay is

not a cost which can be allowed in computing the equitable adjustment in price for the change; hence, it is an expense which must be absorbed by the contractor out of the original contract price." The instant case is distinguishable from the *Rice* case in that the delays on the Federalsburg job were the result of defective plans and faulty specifications prepared by the contracting authority without any default or contribution by Appellee. Elaborate proposals were designed and engineered, which were incorporated in the invitation to bid and the subsequent specifications admitted into evidence below. Events have proven that mistakes in design were made.

This Court changed the prior law set forth above in *Dewey Jordan v. Md. National Capital Park & Planning Commission*, 258 Md. 490, 265 A.2d 892 (1970); in which the Court followed the line of cases including *U.S. v. Spearin*, 248 U.S. 132; *Loburnum Construction Corp. v. U.S.*, 325 F.2d 451; and *J.D. Hedin Construction Co. v. U.S.*, 347 F.2d 235; when it held that the contracting authority impliedly warrants that the plans and specifications are adequate and sufficient for the purpose intended and that the contractor is entitled to be compensated for delays in work occasioned by faulty plans and specifications. It should be noted parenthetically that the Soil Conservation Service was also involved in the *Jordan* case, using a contract form similar to the one involved in this litigation. Thus, any government-caused delay became actionable as a breach of contract, in contrast to the former law. Judge Turner decided upon legally sufficient evidence that the Contracting Officer refused to consider the 1968 delay claim because the law at that time interpreted the Changes Clause to permit the delay of the contractor while changes in the specifications were being consumated, and as a result the Contracting Officer only awarded an extension of time to Allied consisting of the twenty-one days referred to on bith the letters of October 21, 1968, and February 25, 1969, along with an equitable adjustment of the contract price to cover the increase in time and costs plus a reasonable profit incident to the making of the

changes in the piers' reconstruction. *Jordan* established that the government implicity warrants that the contractor, if he complies with the specifications, will be able to complete the project within the contemplated period of time. This warranty is in addition to the condition implied in every construction contract that one delayed in the execution of a contract as the result of a default by the other contracting party would be entitled to recover the damages thus sustained. *Organe, Alexandria and Manassas R.R. Co. v. Placide*, 35 Md. 315 (1872); *Linz v. Schuck*, 106 Md. 220, 67 A2d. 286 (1907); *Dillon Properties, Inc. v. Minmar Builders, Inc.*, 257 Md. 274, 262 A.2d 740 (1970); and the cases cited therein.

It is this change in the law which this Court should now recognize as applicable to this case. Up until the time suit was filed on March 21, 1972, Allied was continually prevailing upon the Contracting Officer to reconsider his refusal of jurisdiction for an equitable adjustment under Clauses 3 and 6 for the 1968 delay claim in the light of *Dillon Properties* and *Jordan*, and the correspondence (Allied's letter to Mr. Hargreaves dated February 1, 1971) reflects reliance upon these legal developments. For its part, the Appellant continued to entertain these overtures and even requested a release from these pending claims in return for final payment. See the letter of February 25, 1969, abovementioned. The Appellant could not, according to the new Maryland doctrine, by its errors in the design of this project, cause delay in Allied's completion of the work and then compensate Allied merely by extending its performance time and by payment of any added direct cost occasioned by these changes and mistakes. In short, the Appellee was led to believe that its damages were defined by the *Jordan* rule to extend to the costs incurred by reason of the idleness resulting from the Appellant's mistakes. Consequently, Appellee was forced to resort to the Courts to achieve a hearing on the merits of its 1968 delay claim under the auspices of these recent cases. To allow the Contracting Officer's indecision to stand as a bar to recovery now would impair the obligations of contract and deny the Appellee substantive and procedural due process of

law, as guaranteed by the U.S. Constitution and Amendment XIV against state action denying due process of law. The Appellee requests the Court to pass upon these threshold federal questions. Judge Turner, of course, had the benefit of this argument, as hereinabove developed, before him, as witness Plaintiff-Appellee's "Brief and Memorandum of Law," dated Nov. 20, 1973, in the record, which cites *Jordan, et al;* and therefore, once again, the Trial Court's findings should be allowed to stand unimpaired in accordance with this august Tribunal's established rules of practice.

(D) IN LIGHT OF THE FOREGOING, AND NEW EVIDENCE WHICH HAS BEEN RECENTLY DISCOVERED, THE COURT SHOULD, IN THE ALTERNATIVE, REMAND THIS CASE FOR THE TAKING OF ADDITIONAL TESTIMONY OF THE WITNESSES ON THESE POINTS ALL AS HEREINAFTER SET FORTH.

Rule 871 of the Maryland Rules of Procedure permits a remand "if it shall appear to this Court that the substantial merits of a case will not be determined by affirming, reversing, or modifying. . . , or that the purposes of justice will be advanced by permitting further proceedings in the cause, including the introduction of additional evidence." 23 *Md. L. R.* 99 (1963). The purpose for so remanding would be to prevent the perpetration of a substantial, albeit inadvertent, injustice upon the Appellee hereunder, by allowing the Trial Court to develop more concrete and accurate factual information on certain specific questions relating to the issue of limitations, in order to remove the uncertainty and speculation from the present posture of this case. The Appellee only requests a limited remand in the alternative, if this Court should not modify its opinion on the basis of the evidence submitted thus far. This Court's absolute right to remand upon a meritorious claim has been established beyond question. *Levin v. Union National Bank*, 224 Md. 603, 168 A.2d 889 (1961); *Davis Sand and Gravel Corp. v.*

Buckley, 231 Md. 370, 190 A.2d 531 (1963). Specifically, Appellee prays leave to clarify the following points:

(1) Admission of the sealed Bid Bond.

(2) Admission into evidence of the sealed Payment Bond and Performance Bond sections of the contract documents.

(3) Admission of a memorandum of law by the attorney, now deceased, Andrew B. Kingan, who actually signed and sealed this contract, indicating his intent and belief that his corporate seals operate to create a specialty.

(4) Such other extrinsic evidence of the intent of the parties as may be available.

(5) Correction of the erroneous testimony of Mr. Ifft at Appellee's appendix page 8 where he states "J. Pecora signed" when actually A.B. Kingan had signed and sealed the instrument.

(6) Introduction of all original contract documents last known to be in the custody of the Town of Federalsburg, or the Soil Conservation Service. The originals would remove the element of speculation now underlying and undermining the Court's present position.

(7) Further testimony on the tolling of the statute of limitations, particularly in regard to the meaning of the Contracting Officer's letters of October 21, 1968, and February 25, 1969.

(8) Admission into evidence of minutes of the meeting of February 19, 1969 in which the 1968 claim was acknowledged by the Contracting Officer's clear, distinct, and unqualified admission and acknowledgment of its continued pending status.

(9) Testimony by the Contracting Officer should be adduced to clarify his legal grounds for refusing to assume jurisdiction over this 1968 claim.

(10) Such other evidence as fairness and equity in this cause may require.

CONCLUSION

For the aforegoing reasons, the Appellee respectfully moves this Court to:

(a) Modify its opinion as above set forth; or, in the alternative,

(b) Grant a reargument, or, in the alternative,

(c) Stay the mandate and remand the case to the Trial Court for the taking of additional evidence as above set forth.

Respectfully submitted,

DATED _____

OWEN WISE
Attorney for the Appellee.

_____

CERTIFICATE OF SERVICE BY MAILING

I Hereby certify that on this 27th day of June, I mailed a copy of the foregoing motion for a modification to Starke M. Evans, Attorney for the Appellant, at 14 Morris Avenue, Federalsburg, Maryland 21632. Dated 1975.

OWEN WISE
Attorney for Appellee.

Letter dated July 17, 1975

COURT OF APPEALS
Of Maryland
Courts of Appeal Building
Annapolis, Md. 21401

James H. Norris, Jr.
Clerk

July 17, 1975

J. Owen Wise, Esq.
Attorney at Law
110 Market Street
Denton, Maryland 21629

RE: Mayor and Council of Federalsburg,
Maryland v. Allied Contractors, Inc.
No. 156 - September Term, 1974

Dear Mr. Wise:

The Court has considered the motion for a reargument, etc. filed on July 3 in the above entitled case and has denied said motion on July 16, 1975.

The record is being returned to the Circuit Court for Queen Anne's County.

A copy of the mandate is enclosed.

Very truly yours,

/s/ James H. Norris, Jr.
Clerk

JHNjr/h
Encl.
cc: Starke Matthew Evans, Esq.

MEMORANDUM OPINION AND ORDER

In this case, Plaintiff, Allied Contractors, Inc., filed a three count suit against the Defendant, Mayor and Council of Federalsburg, Maryland, for money payable on a contract entered into by the parties for work on Defendant's Marshyhope Creek watershed project.

Defendant filed general issue pleas to each count and also plea of limitations stating that the cause of action did not accrue within three years before the filing of the action.

A hearing on the limitations plea was heard, in open Court, and counsel for the parties were also given the opportunity to file briefs on behalf of their respective clients. The briefs were filed by counsel and were of great assistance to the Court.

The President of the Plaintiff Allied Contractors, Inc., testified that they entered into a written contract with Defendant Mayor and Council of Federalsburg, Maryland, for reconstruction of two bridges and for slope protection work in the area. The piers were to be made deeper and the channel was

to be widened and dug deeper for flood control and slope protection.

The testimony indicated that conditions encountered after work began were not anticipated when the agreement was reached and contract signed; these problems delayed the job and also necessitated extra work and materials for which the parties have been negotiating payment since completion of the work on or about 17 September 1968.

The following facts are considered relevant in ruling on the plea of limitations:

That there was a written contract under seal entered into between the parties; this agreement was dated July 28, 1967; it was executed and returned to the Defendant by the Plaintiff on August 8, 1967; work proceeded as scheduled until December 8, 1967, when it was stopped until December 20, 1967, Plaintiff claims pursuant to a stop-work order given by Defendant's contracting officer, Mr. John R. Hargreaves; Count II of Plaintiff's Amended Declaration is for the damages it claims suffered as a result of this shutdown; also in December 1967, it was discovered that Pier No. 1 would require guniting above the 18" mark and this was done by the Plaintiff at about that time; Count III of Plaintiff's Amended Declaration is for the work done at that time; work was again stopped January 31, 1968, which stoppage Plaintiff claims was also pursuant to a *stop-work order* from Defendant's contracting officer, Mr. Hargreaves; Count IV of Plaintiff's Amended Declaration is for damages it claims it suffered as a result of this shutdown; the job was completed on or about *September 17, 1968* and the Defendant notified the Plaintiff on or about September 28, 1968 that the work had been completed to its satisfaction; for the next few months after September 1968, there was considerable discussion and correspondence between the parties and others concerning measurements of quantities by Defendant and unresolved claims of the Plaintiff; March 4, 1969, Plaintiff

received the *proposed final estimate of Defendant's Officer* for review by Plaintiff; Plaintiff did not accept or return the *proposed* final estimate since it omitted payment for certain claims of the Plaintiff, on which negotiations were in progress and continuing, and, on September *19*, 1969, the Contracting Officer gave Plaintiff thirty (30) days within which to process the proposed final estimate or he would do so on a unilateral basis; by letter of October 27, 1969, Contracting Officer wrote to Plaintiff and agreed to further discuss payment of the claim; finally, Plaintiff cashed the $11,823.37 check, which was dated November 6, 1969, with the endorsement that acceptance of the check did not constitute a waiver of claims, as outlined in its letter of September 26, 1969; the instant suit was filed March 2, 1972 and the Amended Declaration was filed on June 13, 1972.

The question for the Court at this time is whether on the facts and evidence now before the Court, Plaintiff's claims, or any one of them, are barred by limitations so as to require a dismissal thereof.

It appears to this Court from the evidence before it that Plaintiff's claim is not barred by limitations.

The first question which arises is what is the applicable period of limitations in this case.

The Plaintiff contends that the contract involved in this case is a contract under seal and is a specialty within the meaning of the statute and is therefore subject to a 12-year period of limitations. The contract speaks for itself as being a sealed instrument; however, Defendant's only witness also admitted (T. 15) that Plaintiff's seal was affixed to the contract. Maryland Law Encyclopedia, Limitations of Actions, Sec. 25, says, "Nevertheless the presence of a corporate seal on a contract, coupled with other circumstances, surrounding the execution of the contract indicating an intention to constitute it a sealed instrument, had been held sufficient to constitute

it a specialty within the meaning of the statute of limitations applicable to specialties." See *General Petroleum Corp. v. Seaboard Term. Corp.*, 23 F. Sup. 137; also *Conowingo Land Co. v. McGraw*, 124 Md. 643, at pp. 646-647. See Art. 57, Sec. 3, Annotated Code of Maryland; *Maltre v. Cunningham*, 148 Md. 309; *Ward v. Reder*, Har. & McH. 145; *Sterling v. Reecher*, 176 Md. 567.

It is the contention of the Defendant that the Plaintiff's suit is barred by the three-year statute of limitations, the contention of Defendant being that the statute of limitations began to run September 25, 1968, when Defendant finally accepted all the Plaintiff's work under the contract. Defendant contends that Plaintiff could have filed suit on September 17, 1968, as the contract payments were due at that time.

It appears to the Court that if the Defendant considered the contract complete on September 25, 1968, why did it not tender a final check with its letter of that date.

The contract in this case was a "unit price" agreement in which the Defendant was required to make measurements and quantity computations which were then used as a basis for submitting payment estimates to the Plaintiff. Until these computations are tendered to the Plaintiff, it is unable to determine or decide if it wants to argue, or sue, and if so, about what and for how much; and any attempt to do so, prior to such tender, would have been premature. In this case, the *proposed* final payment was not sent until February 1969, so it must be conceded that it would be difficult to conceive how limitations could begin to run in September 1968 on a claim which was not reduced to figures until February 1969.

It is very apparent to this Court that these parties have been negotiating both by letter and personal encounters concerning the balance due under the contract. It is true that the Plaintiff cashed Defendant's check for $11,823.37, which was dated November 6, 1969, having added, however, the

endorsement that acceptance of the check did not constitute a waiver of their claims as outlined in its letter of September 26, 1969.

It should be kept in mind that what Defendant refers to as a "Final Payment Estimate" was in reality a "Proposed Final Payment Estimate", which difference "Plaintiff suggests is more than one of semantics"; the Court agrees with this. It seems that the use of the word "proposed" indicates that the intent of the contract, if not also of the parties, was that submission of the estimate was merely another step in computing payment under the contract rather than the termination thereof. Even Defendant's own witness, Mr. Ifft, testified (T. 11 and 12) that negotiations were conducted after this date on bills and claims pertaining to the contract, which contract Defendant now contends *had then* been completed. It is to be noted that on October 27, 1969, Contracting Officer, Mr. Hargreaves, wrote Plaintiff and agreed to further discussion of the claim.

The Court agrees that it is doubtful, in this case, from the evidence before it, if limitations has yet begun to run since there has yet to be a refusal by the Defendant to pay all the claims of Plaintiff. It seems that from the evidence Defendant was continuing to communicate with Plaintiff in such a way as to indicate an intention to pay the claims, the big question being when and which agency would ultimately be responsible for the cost of the work done.

The law as the Court understands it is that limitations begins to run where contracts are involved from the date of the alleged breach and the breach sued on in this case is the failure of Defendant to pay. *Cotham & Maldonardo v. Board of County Commissioners for Prince George's County, Md.*, 260 Md. 556. Therefore, a pertinent inquiry is when did the Defendant fail to pay. It was stated in *Joseph J. Hock v. Baltimore Contractors*, Inc., 252 Md. 61 at page 68, citing *Baltimore Co. Dept. of Education v. Henry A. Knott, Inc.*, 234 Md. 417, . . . "this seems to support the argument that there can be no acceptance until completion and there can be no completion so long

as a portion of the contract price is held back to secure full performance." So, even assuming the project was completed, the contract would not be completed until there was payment, or limitations cannot be said to run until there was a refusal of payment. The testimony shows (T. 14 and 33) that the proposed final payment estimate was sent on February 24, 1969, for Plaintiff's review; but, it was not until over eight (8) months later that the check was sent by the Defendant, yet the Defendant now claims that the *Plaintiff* was dilatory and limitations has run.

Note the effect of the contracting officer's letter of October 27, 1969 (T. 41) which is some eleven (11) months after the work had been completed:

> "I will agree to a meeting with the State Roads Commission, Soil Conservation Commission, Zollman Associates, and other interested parties, and Allied Contractors, Inc., for the purpose of further discussion concerning this matter."

This is another clear indication that negotiations were still in progress as to the amount due Plaintiff under the contract.

It is to be noted further that the proposed final payment estimate was not received by Plaintiff until March 4, 1969 (T. 32) which is within the period of limitations, assuming they started to run when the "proposed payment" estimate was received by the Plaintiff for its review.

The action of the Court in holding that Plaintiff's claim is not barred by limitations is further sustained by the fact that from the uncontradicted testimony of Mr. Pecora, President of Plaintiff Allied Contractors, Inc., there were continuous meetings, correspondence and negotiations between the parties regarding unresolved issues arising out of the contract and work done thereunder (T. 36, 40, 41 and 42). Why would these meetings and negotiations continue if the contract were fully completed and nothing remained to be done?

The Defendant produced no testimony to show it unequivocally and categorically denied Plaintiff's claim more than three (3) years ago, and further, the evidence (T. 35 and 36) shows from previous experience Defendant's mere failure to pay was not evidence that payment would not be forthcoming. The Plaintiff had every reason to believe from Defendant's willingness to continue negotiations that Defendant was not irrevocably refusing to pay or denying liability.

It is the opinion of the Court that if the statute of limitations began to run more than three (3) years prior to the filing of suit it has been tolled for the reasons herein stated.

This Court also is of the opinion that this is not an appropriate case for interposition of a plea of limitations.

The Court agrees that the purpose of the plea of limitations is to protect against stale claims where "evidence has been lost, memories have failed and witnesses have disappeared". *Feldman v. Granger,* 255 Md. 288, at page 297. In the case of *Foos v. Steinburg,* 247 Md.25, at page 38, the Court said "the plea of limitations is not looked upon favorably by the Courts and accordingly the rules governing it are to be strictly construed."

In view of the fact that the parties have been actively engaged in discussing and attempting to resolve the very claims sued up here without going to Court, it would not be fair at this time to defeat the Plaintiff's claim by the sustaining of the interposition of the plea of limitations, as a matter of law.

It Is Therefore ORDERED, this 12th day of July, 1973, by the Circuit Court for Queen Anne's County, that the Plea of Limitations filed herein by Defendant is DENIED.

/s/ B. Hackett Turner, Jr.
JUDGE

Filed July 12, 1973

Letter dated September 26, 1969

ALLIED CONTRACTORS
INC.
General Contractors
Baltimore, Md. 21202

September 26, 1969

Mr. John R. Hargreaves
Contracting Officer
Office of Mayor and Council
Federalsburg, Maryland 21632

Re: Our contract 2432 X-4,
X-5, X-6
Contract MHC-1-67
Bridge Underpinning over
Marshyhope Creek
Federalsburg, Maryland

Dear Mr. Hargreaves:

Receipt is acknowledged of your letter of September 19, 1969 concerning the final payment estimate sent to us by your letter of February 25, 1969. Under separate cover we are returning this estimate to you unsigned since we have the

following outstanding claims which are in the process of negotiation.

1. X-4 – Delay in contract on Highway Bridge stopping commencement of Phase II on account of design changes in adding treated sheetpiling (Submitted March 5, 1968) $7,354.24

2. X-5 – For guniting Pier No. 1 286 square feet @ $32.00/c.f. $9,152.00

3. X-6 – Delay due to Stop Order No. 19 while Engineers are redesigning Piers 2 and 3. Work stopped from January 31, 1968 to April 8, 1968 (Submitted September 23, 1968) $57,516.42

We wish it clearly understood that we have not accepted this estimate nor have we waived any of our claims stated above.

Very truly yours,

ALLIED CONTRACTORS, INC.

J. Jay Pecora
President

JJP:mlk

Letter dated September 19, 1969
Replied by Allied's Letter dated 9-26-69

OFFICE OF
MAYOR AND COUNCIL
OF FEDERALSBURG, MARYLAND

September 19, 1969

Mr. J. Jay Pecora, President
Allied Contractors, Inc.
204 East Preston Street
Baltimore, Maryland 21202

Re: Contract MHC-1-67
Marshyhope Creek
Watershed

Dear Mr. Pecora:

In my letter dated February 25, 1969, I transmitted the final payment estimate for the above mentioned contract. You acknowledged receipt of this in your letter of April 10, 1969, and stated that you would reply to this matter under separate cover and in due course. As of this date, we have not received the reply so we have not been able to process this final estimate for payment.

If you do not return this estimate within thirty (30) days of the date you receive this correspondence with the release of claim block initiated, we will assume that you have accepted this estimate and will process it for final payment.

Very truly yours,

/s/ John R. Hargreaves
Contracting Officer.

MEMORANDUM OPINION AND ORDER
(In the Circuit Court for Queen Anne's County)
Law No. 3531

This case involved a general contractor, Plaintiff, who sued an incorporated municipality under a number of common counts and in specific counts for damages caused by delays (allegedly the fault of the Defendant), and for work done in applying a mortar treatment to a part of one of the bridges over the Marshyhope River near the town of Federalsburg, Caroline County, Maryland.

After trial, Plaintiff was awarded a verdict, by a jury, in the amount of *$74,022.66* under the first count of Plaintiff's Amended Declaration.

Count One of plaintiff's Declaration reads as follows:

1. For goods sold and delivered by the Plaintiff to the Defendant at its request.

2. And for work done and materials provided by the Plaintiff for the Defendant at its request.

3. And for that the Plaintiff, during 1967 and 1968, provided labor, materials and equipment to the Defendant, at its request, for use in the Defendant's Marshyhope Creek Watershed Project, for which the Defendant promised to pay but has failed and refused to do so despite demand therefor by the Plaintiff, and on account of which there remains due and owing from the Defendant to the Plaintiff the sum of Seventy-Four Thousand Twenty-Two Dollars and Sixty-Six Cents ($74,022.66).

Wherefore the Plaintiff claims from the Defendant, the sum of One Hundred and Fifty Thousand Dollars ($150,000.00) damages, plus interest and costs of suit.

Defendant filed a timely Motion for Judgment N.O.V. or In The Alternative For a New Trial and, after hearing in open Court and counsels' filing very able and helpful briefs on the law to sustain their positions, the Court is now ready to act on the Motions.

It is the understanding of this Court that under the Motion for Judgment N.O.V. the Court must consider the evidence in a light most favorable to the party against whom the motion is made and assume the truth of all credible evidence on that issue and all inferences fairly deducible therefrom. See *Miller v. Michalek*, 13 Md. App., pp. 16-17. If there is any competent evidence, however slight, leading to support the Plaintiff's right to recover, the case should be submitted to the jury and a motion for judgment n.o.v. denied. *Belleson v. Klohr*, 257 Md. 642-46; also see *Wheeler Trans. Co. v. Katzoff*, 242 Md. 431.

It is also the opinion of the Court that granting or refusing a new trial is not reviewable on appeal except under the most extraordinary or compelling circumstances, even though the decision might have been based upon mistake or erroneous conclusions of law or fact. See *Carlile v. Two Guys*, 264 Md. 475, and cases cited for full discussion of this point; also see *I.O.A. Leasing Corp. v. Merle Thomas Corp.*, 260 Md. 243.

It is the opinion of this Court that the jury in this case could quite properly have found from the evidence that, under Count 1, there was an implied in fact contract arising from the prior contractural relationship and dealings between the parties and the Defendant's requests of Plaintiff, for the Defendant to pay the Plaintiff for all work done including its standby commitment of men and equipment, in preparation for completion of the revised plans and specifications of the written contract. In such case the contract would have been based, not upon the benefit accruing to the Defendant, for there could well have been none, but upon the jury's finding that the Plaintiff proceeded in good faith upon the expectation of

payment therefor from the Defendant. And, under the circumstances, Defendant should have expected to pay the value of that which was furnished or provided.

> "A contractor who has been wrongfully prevented by the owner from rendering substantial performance, and thus creating a right to the contract price, has, in addition to his remedy and damages as above stated, an alternative restitutionary remedy. This is quantum meruit – a judgment for the reasonable value of the work, labor, and materials actually rendered and used in the performance of the contract before the Defendant's repudiation or other vital breach.
>
> "The building contractor's claim for damages may be based in part on losses due to the owners, causing unreasonable delay in completion. The contractor's machinery and labor force may have been kept idle, when but for the delay they would have been income producing. In such case these losses must be estimated. It is proper to admit expert testimony as to the rental value of machinery, the extra amounts paid to hold the labor force together, and also a reasonable proportion of overhead cost fairly chargeable to this job during the delay. . . . ." Corbin on Contracts, Vol. 5, Damages, Sec. 1094, pages 513-514.

It must be borne in mind that the jury's verdict was not so structured as to require it to state what contract it found, and Count 1 contains three separate paragraphs. The Court agrees that the jury could have found an implied in fact contract under the common counts alleged in paragraphs 1 or 2; or it could have found an oral or written contract under paragraphs 3. The latter paragraph refers to labor, materials and equipment provided, at the request of the Defendant, for use in the Marshyhope Project, and the jury could have found that the idle

men and equipment were contemplated in that contract. The contract could be inferred from the Defendant's actions in instructing Plaintiff not to remove the cofferdam and in making repeated use of it during the delay periods. This Court further agrees that such a verdict is justified whether it is based on assessing damages under the written contract introduced in evidence, or based upon an independent oral contract.

The jury verdict in this case was a measure of the damages as shown it by Plaintiff's witnesses and exhibits. The jury could justifiably have found from the evidence either an oral or written, express or implied contract, under Count 1, and have based its finding of damages on the contract so found. In such case, those damages are in no way circumscribed by any benefit to the Defendant, or lack thereof. See 25 C.J.S. Damages, Sec. 77; pp. 866-67; also Sec. 78, p. 871. See also *Lynch v. Culhane,* 129 N.E. 717; *Rogers v. Becker-Brainard Milling Machine Co.,* 98 N.E. 592; *City of Phila. v. Tripple,* 79 Atl. 703, p. 706; *Vickery v. Ritchie,* 88 N.E. 835, pp. 836-37; *Mulholland v. Mayor, etc. of N.Y.,* 20 N.E. 856-8; *State v. Feigle,* 162 N.E.55 at p. 58; *Petropoulos v. Lubienski,* 220 Md. 293 at pp. 301 and 302.

The jury, upon the evidence and testimony, determined Defendant had breached the contract it thought existed and the damages, by its verdict, were what it considered the fair and reasonable value of the labor, services, and materials provided at Defendant's request, and any benefit to Defendant, if any there was, was immaterial to such finding.

Suppose we do assume a benefit was required in this case, has any benefit been shown accruing to the Defendant which the jury might have considered?

The Court will enumerate some of these benefits which were testified to by Plaintiff and submitted for jury consideration:

1. The Town received 286 sq. ft. of guniting to Pier 1 and contract price was $32.00 per sq. ft. The jury could have used the contract price as a basis for their computation and arrived at a benefit to the Town of $9152.00 for the guniting claim. See *Bright v. Ganas,* 171 Md. 493, at p. 497.

2. Plaintiff submitted that the jury could also have found that the Town of Federalsburg received a benefit in the amount of $7354.23 by reason of Plaintiff's men and equipment committed to the job from December 8, 1967 to December 20, 1967. The basis of their finding could well have been that the stop work order, issued by the Defendant's agent, was for the purpose of redesigning the slope protection on one side of the channel. And had not Plaintiff's cofferdam been in place at this time and its men and equipment there to protect it, Defendant may well not have had a slope to protect, for any of the ravages of nature could have destroyed or injured the slope if the cofferdam had been removed. Also, *Plaintiff's letter of 5 March, 1968* is to the effect that Plaintiff was not to remove the cofferdam and certainly from that they could infer some benefit to inure to them from its remaining in place. Having the men on the job and available also allowed Defendant to redesign the slope protection and install timber sheeting. The jury could well have considered it would have cost well over $7354.24 if Defendant had had to hire other labor and contractor at a later date to install timber sheeting to protect the slope.

With respect to Plaintiff's claim for delays from January 31, 1969 to April 8, 1969, in the amount of $57,516.42, the jury might well have considered the benefit arising from the protection afforded by the cofferdam with Plaintiff's experienced men and equipment to look after it. It should be borne in mind that the evidence indicated that Defendant's bridge was unstable and unsafe at that time, and the presence of Plaintiff's men and equipment was probably what held off the Soil Conservation and/or the State Roads Commission from closing the bridge and thus depriving the town citizens of its use for an indefinite period.

The jury also could have found that Defendant, its agents and employees, achieved a benefit by having the concrete piers, which they were attempting to redesign, open and available to them for test borings and inspection at all times.

The inspector's log (Joint Exh. No. 1) for January 31, 1968 indicates the cofferdam was to be maintained by the Plaintiff, from which the jury could infer Defendant was achieving a benefit. The logs also show that Defendant's agents, servants and employees were constantly working in the cofferdam and, at least on one occasion (February 12, 1968), it was pumped out at Defendant's request.

It should also be recalled that there was evidence from the Defendant's witness that the cost of installing one cofferdam might have been $20,000, and as there were two involved, it might well be that the jury determined the eventual cost to the Town might have been $40,000. If the cofferdams of Plaintiff and its men and equipment had not been on the job, the cost to the Town could have been well in excess of the delay claim, since other contractors would have had to be hired to reinstate the piers in a dry condition so they could be examined, tested and rehabilitated. Also, if the cofferdams had not been maintained in place, the services of divers who were said to be very high-priced and whose services had been turned down because of that, would nevertheless have had to be employed to test the piers.

There was also testimony and evidence in the form of pictures that showed the concrete block retaining wall on one slope needed replacing and, had not the Plaintiff's cofferdam been protecting that wall, it may well have been destroyed or been incapable of rehabilitation, and had to have been totally replaced.

If Plaintiff had left the job while Defendant's agents were redesigning the various plans and specifications, it is quite possible the bridge, in its dangerous condition, could have been wiped out or damaged to an extent where a new bridge would have been required by the State and the citizens. The jury could have considered that having the men and equipment available to guard against such an eventuality was a form of insurance in preventing re-bidding on a new contract, with attendant delays and cost increases.

It appears to the Court that the jury properly concluded from the graphic evidence put before it that changes and modifications in the plans which gave rise to the bulk of the claims herein were all initiated by and for the benefit of the Defendant; and this Court agrees that as an incident of the stop work orders issued by the Defendant to make the alterations and changes in the plans and specifications, Defendant ordered and thereby requested Plaintiff to remain on the job and keep its men and equipment available to Defendant.

The third ground counsel for Defendant puts forth in his Motion for New Trial is the "irreparable prejudice resulting from the inadvertent remark of the Court."

The Court obtained from the Court Stenographer a transcript of what was said at the time with respect to profit and non-profit on the job. In substance, the Court stated that it was for the jury to decide the facts of the case and that Mr. Pecora *said* and showed by evidence on the board that he didn't make anything, that he lost money. The Court only stated and repeated what Mr. Pecora had testified to as to his loss of money on the job. At no point does the record show that *I* said in the presence of the jury that "I" believe from the evidence or what Mr. Pecora says that he lost money. If the Court had said that "I think", clearly Defendant would have legitimate grounds for its Motion. However, as the record stands, the Motion for a New Trial on the ground must be Denied.

For the reasons hereinbefore expressed, It Is, by the Circuit Court for Queen Anne's County, this 28th day of February, 1974, ORDERED, that Defendant's Motion for Judgment N.O.V. Or In The Alternative For a New Trial be and the same is hereby OVERRULED.

/s/ B. Hackett Turner, Jr.
Judge

Filed Feb. 28, 1974

MOTION FOR JUDGMENT N.O.V.
OR
IN THE ALTERNATIVE, FOR A NEW TRIAL

The Mayor and Council of Federalsburg, Maryland, Defendant, by their attorney, Starke M. Evans, moves pursuant to Rule 563 that the verdict of the jury and any judgment entered thereon be set aside, and that judgment be entered in accordance with this motion for directed verdict made at the close of the evidence, and stated as grounds for said motion as follows:

1. That there is no proof whatsoever establishing a valuable benefit received by the Defendant in this case over and above the amount valued for the gunniting job on Pier No. 1 which amount was some $9,000, leaving the jury to establish a total of $65,000 in benefits without even a scintilla of evidence upon which to base such a finding; and it is necessary to recover in a count for implied contract to establish not only a loss to the Plaintiff but a non-speculative benefit to the Defendant as per the Court's instructions to the jury in this case.

2. That Plaintiff cannot recover on a count of implied contract for damages claimed to be the result of an express contract once there is established the uncontested existence

of an express contract between the parties and it would open a veritable "Pandora's Box" to allow this verdict to stand as it would establish a completely unique theory in law that negated the legal effect of all established express contracts and allow a jury to completely ignore the existence of such a contract and imply one of their own.

AND the Mayor and Council of Federalsburg, Maryland, by their attorney, Starke M. Evans, moves in the alternative for a new trial for the grounds as stated in the above noted Motion for Judgment N.O.V. and for the additional grounds that the entire trial was irreparably prejudiced by the inadvertent remarks of the Court regarding the existence of a loss and the validity of the blackboard figures designating Plaintiff's claims, which remarks were duly excepted to by counsel through a Motion for a Mistrial made at the proper time.

Defendant Mayor and Council of Federalsburg requests an immediate hearing on its above noted Motion for a Judgment N.O.V. and alternatively, a new trial.

/s/ Starke M. Evans
Attorney for Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of December, 1973, that I personally mailed a copy of the aforegoing Motion for Judgment N.O.V. Or In the Alternative, For a New Trial to J. Owen Wise, 110 Market Street, Denton, Maryland, Plaintiff's Attorney.

/s/
Starke M. Evans

Letter Dated July 16, 1968
From John R. Hargreaves to Mr. Andrew B. Kingan

OFFICE OF
MAYOR AND COUNCIL
OF FEDERALSBURG, MARYLAND

Clerk and Treasurer
Mrs. Mary E. Meredith

Corporation Counsel
Marvin H. Smith

July 16, 1968

Mr. Andrew B. Kingan
Executive Vice President
Allied Contractors, Inc.
Prestway Building
204 E. Preston Street
Baltimore, Maryland 21202

Re: Your Contract 2432 X-5, X-13
Contract MHC-1-67
Bridge Underpinning over
Marshyhope Creek
Federalsburg, Maryland
Your letter July 2, 1968

Dear Mr. Kingan:

Your referenced letter, upon receipt, was somewhat of a surprise to me, inasmuch as the Mayor and Council of Federalsburg, whom I represent as Contracting Officer, did not at any time authorize this work to be done. Moreover, everyone who was either directly or indirectly involved either financially or otherwise with this work or project was advised by myself personally on many different occasions both before, during, and

after the completion of this work on Pier 1; that the Town of Federalsburg would not obligate itself in any manner for the payment thereof, partially or otherwise.

Furthermore, I do not recall any commitment on the part of the Mayor and Council of Federalsburg and/or its representatives to obtain cost share participation by the State Roads Commission.

Will you therefore, please correct your records accordingly?

Very truly yours,

John R. Hargreaves
Contracting Officer

cc: Schupack & Zollman
Mr. Theodore Ifft
Judge Marvin H. Smith
Counsel L. Edgar Brown
Mr. Wilbur Ford
Mayor and Council of Federalsburg

Letter Dated October 27, 1969
From John R. Hargreaves to Mr. J. Jay Pecora, President
Allied Contractors, Inc.

OFFICE OF
MAYOR AND COUNCIL
OF FEDERALSBURG, MARYLAND

Clerk and Treasurer
Mrs. Mary E. Meredith

Corporation Counsel
L. Edgar Brown

October 27, 1969

Mr. J. Jay Pecora, President
Allied Contractors, Inc.
Prestway Building
204 E. Preston Street
Baltimore, Maryland 21202

Re: Contract 2432 X-5
Contract MHC-1-67
Bridge Underpinning
Marshyhope Creek
Federalsburg, Maryland

Dear Mr. Pecora:

Please refer to your letter of October 6, 1969 in response to my letter of September 23, 1969 concerning payment of $9,152.00 for repairs performed by you to Pier No. 1

I will agree to a meeting with the State Roads Commission, Soil Conservation Commission, Zollman Associates, and other interested parties, and Allied Contractors, Inc., for the purpose of further discussion concerning this matter. However, I would remind you that the Mayor and Council still stands

firm in its original position taken at the outset, namely, disclaiming any financial or fiscal responsibility for the work performed on the pier in question. This position was taken at the time you commenced repair work on Pier No, 1, and such position has continued unchanged since.

Please advise date, time and place you have arranged for this meeting.

Very truly yours,

John R. Hargreaves
Contracting Officer

JRH:mem

cc: Leslie H. Evans, Commissioner
State Roads Commission
300 West Preston Street
Baltimore, Maryland 21203

Edgar L. Brown, Esq.
Law Building
Denton, Maryland 21629

Zollman Associates
P.O. Box 8657
Friendship International Airport
Baltimore, Maryland 21640

State Roads Commission
Mr. David H. Fisher
300 West Preston Street
Baltimore, Maryland 21203

Mr. Theodore Ifft
Government Representative
Soil Conservation Service
4321 Hartwick Road
College Park, Maryland 20740

Mayor and Council of Federalsburg
203 N. Main Street
Federalsburg, Maryland 21632

Honorable Marvin H. Smith
Denton, Maryland 21629

EVIDENCE OF THE DENIAL OF THE RIGHT OF PETITIONER TO THE EQUAL PROTECTION OF THE LAW BY THE COURT OF APPEALS OF MARYLAND

ANNE ARUNDEL COUNTY, MARYLAND v. NORAIR ENGINEERING CORPORATION

[No. 239, September Term, 1974.]

Decided July 8, 1975.

BILL OF PARTICULARS–*Defendant May Require Particulars Of Common Count Upon Request – Otherwise, Particulars Permitted Only To Give Defendant Sufficient Notice Of Claim Asserted By Pleading–Particulars Not Substitute For Discovery–Maryland Rule 346 a.* Where plaintiff's special count alleging breach of contract gave sufficient notice to the defendant of the claim, the Court *held* the trial court did not err in sustaining plaintiff's exceptions to defendant's demand for particulars.
Maryland Rule 346a. pp. 483-486

LIMITATIONS OF ACTIONS–*Breach Of Contract–Twelve Year Statute Of Limitations Applies To Action For Breach Of Sealed Instrument–Code (1974), Courts Art., § 5-102(a) (5)–Statute Of Limitations Tolled By Defendant's Part Payment Of Moneys Due Plaintiff Under Construction Contract.* Where contractor filed suit against County for breach of construction contract under seal, and where suit was filed within three years of last payment made by the County on account of the contract, the Court *held* that trial court did not err in rejecting County's defense of limitations of actions.
pp. 486-491

CONTRACTS–*Construction Contract–Deficiencies In Owner's Specifications Constituting Breach–Sufficiency Of Evidence.* Where there was substantial evidence to support trial court's finding that contractor was required to perform additional work because of inherent deficiencies in owner's design, the Court *held* that award of money damages to contractor because of owner's breach of construction contract was not clearly erroneous. Maryland Rule 886.
pp. 486-491

DAMAGES–*Construction Contract–Liquidated Damages For Contractor's Failure To Complete Project In Accordance With Schedule–Parties May Provide For Liquidated Damages Where Actual Damages Are Difficult To Ascertain And Where Damages Stipulated Are Not Grossly Excessive To Possible Damages Resulting From Breach Of Contract.* Where $2 million construction contract contained liquidated damage clause of $150.00 per day, due to delay by contractor in completion, the Court, considering all the circumstances, *held* that such clause was not a penalty, per se, and that trial court erred in not determining the number of days, if any, for which owner might claim liquidated damages. pp. 492-494

J.A.A.

Appeal from the Circuit Court for Anne Arundel County (Childs and Melvin, JJ.)

Action by Norair Engineering Corporation against Anne Arundel County, Maryland, for alleged breach of construction contract. From a money judgment in favor of the plaintiff, Anne Arundel County appeals.

Judgment affirmed in part and reversed in part and case remanded to Circuit Court for Anne Arundel County for further proceedings consistent with this opinion. One-half costs to be paid by each party.

The cause was argued before MURPHY, C.J., and SINGLEY, SMITH, DIGGES, LEVINE, ELDRIDGE and O'DONNELL, JJ.

John M. Court Assistant County Solicitor, with whom were *Paul F. Borden, County Solicitor, Michael R. Roblyer, County Solicitor*, and *Charles Fred Delavan*, Assistant County Solicitor, *on the brief, for appellant*.

Jerome T. May, with whom were *David R. Cuttler* and *Blumenthal, Goldsborough & May* on the brief for appellee.

SMITH, J., delivered the opinion of the Court.

Appellee, Norair Engineering Corporation (Norair), contracted with appellant, Anne Arundel County (the County), to construct in the County the Broadneck Wastewater Treatment Plant. After construction was well under way a large outfall line extending from a chlorine contact chamber to a manhole structure near the shoreline of the Chesapeake Bay was discovered to have pulled apart or to have moved to such an extent that the danger of separation appeared imminent, thus producing this litigation.

Norair sued the County for the extra work involved in correction of this problem. The matter was tried without a jury. The trial judge entered judgment in favor of Norair against the County for $62,241.97, of which $50,741.97 was for this extra work and $11,500 was in connection with a dispute relative to funds that had been retained by the County as a result of its claim for liquidated damages.

The matter reaches us on direct appeal. We shall affirm the judgment relative to the extra work, but on the issue of liquidated damages we shall remand for further proceedings.

Four questions are presented on appeal, (1) whether the judge who considered an earlier law motion erred as a matter

of law in sustaining Norair's exceptions to the County's demand for a bill of particulars; (2) whether the trial court "err[ed] as a matter of law in denying the County's special plea of limitations as to the first Count"; (3) whether the trial court "err[ed] as a matter of law under the contract in finding the County rather than the contractor responsible for the repairs to the outfall line which occasioned the damages claimed in Count I"; and (4) whether the trial court "err[ed] as a matter of law under the contract in finding that the County was either required or failed to demonstrate damage sufficient to recover liquidated damages stipulated in the contract as to Count III." We shall develop facts in the process of discussing these questions.

I

The Demand for Particulars

Count I of the Declaration consisted of three paragraphs, the first two of which were the common counts relative to work done and materials provided and money found to be due on accounts stated, respectively. The third paragraph of that count was as follows:

> "3. and for that on August 19, 1968 in consideration of the sum of Two Million, Four Hundred Fifty Thousand ($2,450,000.00) Dollars Plaintiff contracted with Defendant to construct the Broadneck Wastewater Treatment Plant in Anne Arundel County, Maryland. That the Plaintiff performed its side of the contract in its entirety according to specifications provided by the Defendant but was also required to perform additional work, as permitted under the contract, due to deficiencies and omissions in the specifications for the project, as provided by Defendant. That the additional work was not caused by any fault of the Plaintiff. That the Plaintiff was forced to repair the 48 foot outfall line on

> the project due to the improper specifications causing additional expense over and above the contract price, which the Defendant has refused to pay thereby breaking the contract, and the Plaintiff claims the sum of Fifty Thousand Seven Hundred Forty-One Dollars and Ninety Seven Cents ($50,741.97)."

The demand for particulars here under consideration was:

> "1. With respect to Count 1, subparagraph 3, please state what repairs were accomplished to the 48' outfall line and which specifications are alleged to have been improper and to have caused additional expense above the contract price."

Norair excepted to that demands as improper, claiming that "[t]he information demanded [was] a matter of evidence to prove [Norair's] claim, and [was] not necessary in order to give sufficient notice of the claim," that "[i]t m[ight] not be obtained by particulars, but only, if at all, by interrogatory or other discovery procedure." This exception was sustained, thus producing the County's assignment of error.

First of all, it must be noted that the demand for particulars is not of the first two paragraphs of the first count, the two common counts. Under the statute as it existed for many years prior to 1957 (Maryland Code (1951) Art. 75, § 28 (107) being the most recent codification), a bill of particulars could be obtained as a matter of right "where the pleading [was] so general as not to give sufficient notice to the opposite party of the evidence to be offered in support of it." This was interpreted to require particulars of a common count upon request. *See* 1 Poe, *Pleading and Practice*, § 136 (5th ed. Tiffany 1925). The present Maryland Rule 346 a provides for "a bill of particulars whenever a pleading is so general as not to give sufficient notice to [a defendant] of the claim . . . asserted by such pleading," which has been interpreted as effecting a change in the former rule. *See* editor's

note to Rule 346a. It is in the light of this rule that the present request must be examined.

In *Sommers v. Wilson Bldg. & L. Ass'n*, 270 Md. 397, 311 A.2d 776 (1973), we had before us a demurrer to a declaration. We said relative to the declaration:

> "Even a careful examination leaves one at a loss in determining whether the declaration sounds in assumpsit or tort, or whether it represents an effort by the pleader to impermissibly combine these two forms of action into a single count." *Id.* at 400.

We concluded that the declaration was vulnerable to attack on demurrer and that the interests of justice would be promoted by remanding the case without affirmance or reversal in accordance with Rule 871 a, with leave to file an amended declaration. However, in acceding to the request of the appellant that he be given an opportunity to file an amended declaration, Judge Digges said for the Court:

> "This request is granted in part because confusion has resulted from the appellees' erroneous utilization of Rule 346 (demand for particulars) to procure information which is only obtainable under the deposition and discovery rules (Rules 400-425). Here, the demand sought the particulars of *all* agreements and understandings between the parties, written or otherwise, whether they formed the basis of the action or not, concerning the duty of the appellees to keep the appellants' property insured. Such a broad request under Rule 346 is improper. Particulars are only permitted to satisfy the demands of pleading. *Cline v. Fountain, etc., Company*, 214 Md. 251, 134 A.2d 304 (1957). On the other hand, if a party desires the extensive information requested here, interrogatories and other forms of discovery are the proper tools to be utilized. The

> discovery rules are designed to satisfy the cravings of a litigant to acquire pretrial knowledge of the contentions being made by opposing parties, as well as all facts relevant to the dispute. In fact, a bill of particulars is rarely used today as its function has been largely made obsolete by the rules governing discovery and summary judgment. *Nicholson v. Blanchette*, 239 Md. 168, 188, 210 A.2d 732 (1965); *Hub Bel Air, Inc. v. Hirsch*, 203 Md. 637, 641, 102 A.2d 550 (1954)." *Id.* at 401-02. (Emphasis in original.)

It must be remembered that our present discovery practice is of comparatively recent origin, dating from the adoption by the Court of General Rules of Practice and Procedure on January 30, 1941, effective September 1, 1941, "pursuant to the 18th Section of Article 4 of the Constitution of this State, and Chapter 719 of the Acts of the General Assembly of 1939." All of the information sought by the County here was available to it under Chapter 400 of the Maryland Rules and could well have been obtained by interrogatories under Rule 417. The third paragraph of the first count of the declaration "g[ave] sufficient notice to [the County] of the claim . . . asserted by such pleading." Accordingly, Judge Melvin did not err in sustaining the exceptions to the demand.

II and III

Denying the Plea of Limitations to the First Count
and Holding the County Responsible for
Repairs to the Outfall Line

On this count the trial judge, sitting as the trier of fact, said in his memorandum opinion:

"COUNT I

"Count one embodies the common counts for work and materials and for money found to be due

between plaintiff and defendant. It also contains a special count alleging a contract between plaintiff and defendant dated August 19, 1968 which plaintiff asserts had been fully performed. However, it goes on to state that it was required to perform additional work as permitted under the contract due to deficiencies and omissions in the specifications in that it was required to repair a forty-eight inch outfall line due to improper specifications. The defendant refused to pay the expense of the repair, thereby allegedly breaking the contract.

"To this count the defendant has entered the special plea of limitations as well as a defense.

"The limitations defense is inappropriate.

"Exhibit one which was entered into evidence without objection and purports to be the Specifications Proposal Contract and Bond for Contract No. 580-BS – Broadneck Wastewater Treatment Plant on page A-3 indicates 'that it is a sealed instrument. Such being the case, this case was filed well within the twelve-year period of limitations for such a contract. [Code (1974) § 5-102 (a) (5) of the Courts and Judicial Proceedings Article.] Even if somewhere within this weighty document there were contained a three-year limitation provision, the last payment made by the County on account of the contract was dated March 5, 1971. Suit was filed March 14, 1973, also within the three-year limitation apparently urged by defendant. . . .

"The nature of the claim arises over the fact that on or about November 19, 1969, an inspector surveying the effluent line in question which extended from the chlorine contact chamber to a

manhole structure located distant therefrom some 1000 feet and near the shoreline of the Chesapeake Bay, discovered that some of the sections of pipe which were generally 16 feet in length had either pulled apart completely or had moved to such an extent that danger of separation appeared imminent. The entire line had moved twenty inches toward the outfall structure. . . . When this fact was called to the attention of the project engineer for Norair, he immediately directed that all work stop on the line. A meeting was held with the principals to determine what could be done. The County officials blamed the condition upon gross neglect . . . on the part of the plaintiff; the plaintiff attributed the problem on design deficiencies. The court finds that plaintiff has the better of the argument.

"Details of the line are graphically presented on Exhibit 2, the working drawing.

> "The outfall line was made of prestressed concrete cylinder pipe to be placed in stable soil to a point approximately 259 feet from the north face of the chlorine contact chamber. At that point, the placement was to be made for the remaining distance in unstable soil and muck typical of tidal marsh material found in the Chesapeake Bay region. Beginning four pipe sections in the stable area, the plans called for the pipe to be supported on pile 'bents.' These bents consisted of a creosoted pile driven on either side of the pipe line, the plane formed by the piles being perpendicular to the center line of the pipe. This pair of piles was then notched to receive a pair of four inch by twenty inch timber wales – horizon-

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"1. The exhibit is a blank copy, but the court assumes that the original is fully executed by both parties.

tal beams – bolted to the piles at the precise elevation for the particular station. These bottom wales would provide a stable platform to support the pipe as it was placed on grade. Shifting of the pipe in a lateral direction was to be prevented by a pair of tapered wooden chocks secured to the bottom wales in such a fashion that the tapered faces contacted the outside diameter of the pipe. Once the pipe had been placed on the lower wales, a second pair of four by sixteen inch wales were placed horizontally in contact with the top of the pipe and bolted to the piles. There was no requirement that the upper wales were to exert a compressive force upon the top of the pipe.

"Exhibit 2 indicated that from station 2+11 to station 8+41 the pipe sections were to be laid with the spigot ends toward the Bay. In other words, down hill. From station 8+41 to station 9+90 the Exhibit 2 called for 10 sections of pipe to be laid in the opposite direction, or up hill. This drawing was later revised, however, when a pipe laying schedule, Exhibit 4, was issued by the pipe manufacturer. The schedule was approved by the County's consulting engineer. It called for the laying to commence 4 feet six inches from center line of pipe to face of contact chamber, and 'lay bells ahead up station' ('up station' would necessitate laying pipe toward the Bay – or downward, the difference in elevation between the beginning and the end being 8.45 feet – 2.83 feet or 5.62 feet over the entire distance). While the plan as originally drawn, Exhibit 2, indicated the spigot end of the pipe to be laid up-station, the copy furnished the court indicates a pencilled revision showing the bell and to be laid up station consistent with the pipe laying schedule. Section 10-03 of the specification required that installation of all concrete pipe shall be in strict accordance with the manufacturer's instructions and recommendations.

"The specifications also required the contractor to refill all excavations as rapidly as possible after completion of the work therein, or after the excavations have served their purpose. . . . F 'rsuant to this provision only two sections of pipe were allowed to be exposed at one time. It was County policy to back-fill as rapidly as possible to avoid the hazard of anyone falling into the excavation and to protect the completed work.

"In the entire design of the system there was no provision whatsoever to guard against longitudinal movement, even though at the point ofgreatest movement unstable earth existed to an approximate depth of twenty-two feet below the finished grade of the pipe bottom.

"James J. Schnabel, a professional engineer and soil mechanics expert produced by plaintiff, testified that timber piles driven for pipe support were off as much as 1-¼ inches *per foot* with directional movement generally toward the man hole. Specifications required that all piles be driven in the presence of the engineer and would be considered plumb if their batter did not exceed ¼ inch per foot. . . . Mr. Schnabel further was of the opinion that longitudinal pressures from the method of progressive backfilling would result in cumulative movement towards the soft deposits of marsh vegetation with the sections of pipe being carried along with this force.

"The County argues that had plaintiff followed the usual engineering practice and worked down-station (uphill) instead of up-station (down-hill) and backfilled at a constant level throughout the length of the line after the entire line had been completed, the problem would never have arisen. That this is so,

it argues, is self-evident in that once that procedure was followed, the line remained stable and no further difficulty was encountered since no other provisions were taken to prevent horizontal movement.

"In the first place, there was no testimony from which the court could conclude that it was customary in such projects to work from the lower to the higher elevation. Secondly, had this been done it would have been violative of the contract specifications, since the manufacturer's directions clearly called for laying the pipe up-station and as a result of this the County revised exhibit 2 to provide for working upstation. Moreover, had the pipe been laid downstation, each succeeding pipe section would have had to be supported in a sling or some such device and adjusted to proper elevation until joined to the next pipe section – a highly awkward and inefficient procedure. Plaintiff's specifications also called for immediate back filling. Additional steps were taken by the subcontractor to prevent longitudinal movement in that 'dead men' [2] were placed at regular intervals and the pipe anchored to them . . . . Plaintiff's subcontractor initially followed the County's specifications precisely, except that upon uncovering the line it was found that some of the top wales were not in contact with the top of the pipe as called for in the plans. The County's inspector in Exhibit D, p. 6, noted that these wales were installed with top wale touching the pipe. The only possible conclusion which can be drawn from this set of circumstances is that the County's requirement for progressive back-filling created upward pressures

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"2. An achoring device buried in the ground to which a structure is attached to prevent movement.

which floated or lifted the pipe off the bottom wale before the top wale could be secured in place, since the weight of the pipe in and of itself would have kept it in place had not an extraneous lifting pressure been previously exerted.

"Attempt was made by defendant to attribute the shifting of the piles to the method of removal of the overburden, but the court has heard no convincing evidence of this. While it was reported that backfill was placed longitudinally with the pipe rather than transversely as suggeste ! by the County's inspectors, there was no prohibition as to the longitudinal backfill method in the specifications. Since the subcontractor was not a designer of the structure, it could scarcely be held responsible for inherent design deficiencies which failed to guard against structure movement in a medium recognized to be unstable.

> "Therefore, in the first count the court will award judgment to the plaintiff in the amount of $50,741.97. . . ., there having been no contest as to the unreasonableness of this charge." (Emphasis in original.)

We perceive no error of law in that opinion, nor, as to the factual matters there set forth, can we say that "the judgment of the lower court . . . [is] clearly erroenous. . . . . " Maryland Rule 886.

IV.

Liquidated Damages

The contract provided in paragraph 4-07 (a) for the County to "determine the number of calendar days, if any, that the Contractor is in default in completing the contract" and that "[f]or each calendar day of default, the Contractor

sh[ould] pay the County the sum of $150.00, which sum [was] [t]hereby agreed upon, not as a penalty, but as liquidated damages which the County w[ould] suffer by reason of such default. . . ." The County originally assessed liquidated damages for 77 days, but ultimately concluded that 58 days was the proper number of days, thus producing a dispute here as to $8,700.00. The trial judge found "that the County having sustained no demonstrable damage arising from [Norair's] delay in completion of the project, the assessment of the per diem sum of $150 per day was completely unrealistic and bore no relation to any justifiable claim on the County's part and constituted an unenforceable penalty," a point which, of course, is here urged by Norair. We do not agree.

In *Balto. Bridge Co. v. U. Rwys. & E. Co.*, 125 Md. 208, 93 A.420 (1915), Judge Pattison said for this Court:

> "From the authorities given above it may be stated as a settled rule of law, that where the parties, at or before the time of the execution of the contract, agree upon and name a sum therein to be paid as liquidated damages, in lieu of anticipated damages which are in their nature uncertain and incapable of exact ascertainment, that the amount so named in the agreement will be regarded as liquidated damages and not as a penalty, unless the amount so agreed upon and inserted in the agreement be grossly excessive and out of all proportion to the damages that might reasonably have been expected to result from such breach of the contract. And whether it is excessive or whether the damages are incapable of exact ascertainment should be determined from the subject-matter of the contract considered in the light of all the surrounding facts and circumstances connected therewith and known to the parties at the time of its execution. That these questions should be considered and determined from the contract itself, its subject-matter and the surrounding facts and circumstances connected therewith with which the

parties are confronted at the time of its execution, is made necessary in order to ascertain the intention of the parties, which is one of the essential factors in deciding whether the stipulation is for liquidated damages or is a penalty. It may afterwards be disclosed that the damages actually sustained are more or less than those anticipated at the time of the execution of the contract. If more, this fact would not characterize or stamp the stipulation as a penalty unless it was so exorbitant as to clearly show that such amount was not arrived at in a *bona fide* effort, made at or before the execution of the contract, to estimate the damages that might have been reasonably expected to result from a breach of it, and that it was named as a penalty for such breach. And on the other hand, if the amount stipulated was found to be inadequate, a greater amount could not be recovered for such breach, because of the agreement between the parties that the amount so named should be in lieu of the damages resulting therefrom."
Id. at 214-15.

In that case the plaintiff had entered into a contract to do certain work upon a viaduct of the defendant in Baltimore City. The contract was to be completed "within four months from the date of the agreement, or sooner if possible." It was agreed that if the work was not completed at the required time the owner was authorized to retain as liquidated damages the sum of $25 for each day the work remained unfinished after the date designated for its completion. As the Court put it, "the inquiry . . . [was], whether the amount stipulated in the agreement to be paid by the appellant in the event of its failure to complete the work within the designated period, [was] to be regarded as liquidated damages or as a penalty." The Court found the charge in that instance to be one for liquidated damages. This holding remains viable today. *Traylor v. Grafton*, 273 Md. 649, 667-668, 332 A.2d 651 (1975); *Goldman v. Conn. Gen. Life Ins. Co.*, 251 Md. 575, 582, 248

A.2d 154 (1968); *H.J. McGrath Co. v. Wisner*, 189 Md. 260, 264-265, 55 A.2d 793 (1947); and *Hammaker v. Schleigh*, 157 Md. 652, 667, 147 A. 790 (1929). Moreover, as Judge Parke said for the Court in *Hammaker*, "[i]t is a question of law whether the provision is penal or only a liquidation of damages."

It will be noted that the determination of whether the amount specified is a penalty or liquidated damages is to be determined as of the time of execution of the contract. The damages in this instance that would be suffered by the County by delay obviously would be difficult to ascertainment. The amount specified, $150 per day, is not grossly excessive nor is it out of all proportion to the damages that might reasonably be expected to result from breach of the contract, particularly when it is noted that the full contract price was $2,450,000. Accordingly, we conclude that the trial judge erred in awarding Norair the full sum retained by the County as liquidated damages. Since he did not address himself to the number of days for which the County might properly claim liquidated damages, the case must be remanded for a determination on that point.

Judgment affirmed in part and reversed in part and case remanded to the Circuit Court for Anne Arundel County for further proceedings consistent with this opinion; one-half costs to be paid by Anne Arundel County and one-half by Norair Engineering Corporation.